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EXAMINER

ROZANSKI, MICHAEL T

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.



## **DETAILED ACTION**

### ***Claim Objections***

Claims 98-107 are objected to because of the following informalities:

Amendments refer to sensors (plural), while subsequent mention of same elements is referred to as sensor (singular). Appropriate correction is required.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 98-107 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vilsmeier et al (US 6,611,700) in view of Krag (US PUB 2003/0192557 with priority to 5/14/98).

Vilsmeier et al disclose a method and apparatus for positioning a patient 1 lying on a bench 9 for radiation treatment. The patient is positioned such that the isocenter 3 is located in the center of the tumor 2 to be irradiated. A glass fiber cable 6, which serves as a position sensor, is attached to a controller 8 so that the position and directional vector of the outgoing glass fiber 6 is clearly defined by a connecting point serving as a fiducial point to permit obtaining information regarding the location of the glass fiber 6 as a whole using this fiducial point. The other end of the cable 6 is

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implanted in the patient body 1 and fixed in the site of the tumor 2, the end point 4 of the cable 6 not being located on the tumor. By using the positional information of the cable 6 established by the controller 8, the absolute momentary position of the tumor 2 can be detected by determining the position of the end point 4 and/or of a further optional point 5 on the cable. The controller detects the three-dimensional position of individual points 4, 5 and is then able to determine whether the tumor 2 is in the permitted site circumscribing the isocenter and to suitably control the patient bench 9 to position the tumor 2 and/or the radiation source accordingly. The radiation source turns OFF when the tumor 2 moves out of the isocenter 3 and back ON when tumor 2 is in the isocenter 3 (col 4, line 56-col 5, line 26). The controller 8 is a device that loads and executes computer program code and, therefore, is a computer including computer operable instructions. In addition, the controller 8 repeatedly receives (i.e. 12 times per minute) positional information of the individual points 4, 5, determines a location of the marker relative to a frame of reference defined by positional information of the glass fiber cable 6, and computes a displacement between the location of the marker and a desired location of the marker wherein the target is located at a desired situs in the reference frame when the marker is at the desired location for the marker (see col 5, lines 17-26). This also indicates that the bench 9 is moved according to the actual location of the target if a displacement between the actual location of the target and a desired location for the target is beyond an acceptable range.

Vilsmeier et al disclose that the position sensor is a glass fiber cable, thereby not transmitting information wirelessly. However, Vilsmeier et al also states that in principle,

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any sensor may be used as the position sensor enabling the three-dimensional location (col 2, lines 16-19). Furthermore, Vilsmeier et al teach of a unit 8 that receives the position information, rather than a plurality of sensors in a fixed and known geometry relative to each other.

Krag teach of tracking a marker via a plurality of sensors in a fixed and known geometry relative to each other. Krag discloses a similar configuration in that the position of an implantable marker 1100 is wirelessly sensed by a plurality of sensors 1210 in a fixed and known geometry [0150]. The marker is activated by transmitter 1220, which emits an excitation energy that causes the implantable marker to emit a response energy that is detected by sensor array 1204 (see Figures 21 and 22).

It would have been obvious to one with ordinary skill in the art at the time the invention was made to modify Vilsmeier et al, to replace the marker tracking system with one including a plurality of fixed sensors as taught by Krag, because such is merely a substitution of one tracking system with another. Specifically, the skilled artisan would understand that the modification includes placing the marking element of Krag at the site of the tumor at which the glass fiber cable 6 of Vilsmeier is fixedly attached. Such a modification would not render Vilsmeier inoperable because it involves a substitution of parts (i.e. the mechanism by which the marker at the tumor site is tracked) and does not change the principle of operation.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the

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unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 98-107 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-55 and 82-84 of copending Application No. 09/877,498 in view of Vilsmeier et al (US 6,611,700). '498 includes substantially all the limitations of the pending claims including the wireless implantable marker, the plurality of sensors configured to measure the marker signal, and a computer to receive the measured signals to determine the location of a selected target within a body for radiation treatment. However, '498 does not include several limitations such as the computer instructions for directing the radiation beam. Vilsmeier et al teach positioning a body on a support in view of a sensed position of a marker at the target site and providing computer instruction for directing the beam. It would have been obvious to modify '498 to include the radiation treatment features in order to facilitate radiation treatment delivery.

This is a provisional obviousness-type double patenting rejection.

### ***Response to Arguments***

Applicant's arguments, see arguments, filed 4/30/09, with respect to Dumoulin have been fully considered and are persuasive. The rejection of claims 98-107 over Vilsmeier in view of Dumoulin has been withdrawn.

Applicant has not overcome the rejection over Vilsmeier and Krag, as Applicant has deferred overcoming the Krag reference by removing as 103(a)/(c) and has not addressed the details of the combination of Vilsmeier and Krag. Further, Applicant has not addressed the claim objections. In addition, the terminal disclaimer has not been approved because there is no power of attorney/more than 10 practitioners listed on the power of attorney (see rule 37 CFR 1.32(c)(3)). Therefore, this action is made Final.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MICHAEL T. ROZANSKI whose telephone number is (571)272-1648. The examiner can normally be reached on Monday - Friday, 8-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Long Le can be reached on 571-272-0823. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Eric F Winakur/  
Primary Examiner, Art Unit 3768

MR



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